IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ERIC MANUEL DOMINGUEZ, Appellant.	)	2 CA-CR 2006-0210 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR-200500403

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Robert A. Walsh — Phoenix
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

P E L A N D E R, Chief Judge.

¶1 After a bench trial, appellant Eric Dominguez was convicted of possessing a deadly weapon as a prohibited possessor. Pursuant to a stipulation, the trial court sentenced him to a fifteen-year prison term. On appeal, Dominguez contends the trial court abused its

discretion by denying his motion to suppress evidence, the evidence was insufficient to support his conviction, and his sentence is illegal. Finding no merit in any of these arguments, we affirm.

BACKGROUND

¶2 "We view the facts in the light most favorable to sustaining the convictions, with all reasonable inferences resolved against the defendant." *State v. Riley*, 196 Ariz. 40, ¶ 2, 992 P.2d 1135, 1137 (App. 1999). In May 2005, Bisbee police officer Charles Austin responded to a report of a loud party. According to Austin's police report, witnesses at the scene reported that "a group of people had just stolen a keg of beer" and that the "subjects had pulled two guns out and were threatening people at the party." One of those subjects, "identified as Eric Dominguez . . . by witnesses on [the] scene, [had] beg[u]n brandishing what they described as a snub nose revolver pistol." People began leaving the party after this incident, but Austin interviewed several people who had remained at the scene. Officers also searched the area, but no weapons were found. When Austin went off duty he "asked the next shift to locate and hold Dominguez for questioning."

¶3 The following morning, Officer Brian Swan saw Dominguez in front of a hair salon, working on a red Dodge truck that was being towed by a silver Chevrolet pickup truck. Swan pulled into the driveway of the business behind the Dodge truck and called a second officer, Howard Gardner, for assistance. Swan left his vehicle "with [his] duty weapon drawn" and told Dominguez to put his hands up and not move. Dominguez followed Swan's instructions, and Swan then holstered his weapon and handcuffed

Dominguez. He told Dominguez "he was being detained" and that "he would be patted down for weapons for officers[']safety." As Swan was patting him down, Dominguez attempted to toss away a cigarette box. The box contained what appeared to be crystal methamphetamine.

¶4 Swan then told Dominguez "he was under arrest . . . for possession of a dangerous drug." Officers impounded the two vehicles that had been at the scene and, after obtaining a warrant, later searched them. During the search, officers discovered in the Chevrolet pickup truck a .38 caliber pistol matching the description of the weapon given by witnesses at the party. In an affidavit in support of the warrant request, Officer Gardner averred the gun had been observed in that truck.

¶5 Dominguez was charged with possessing a deadly weapon as a prohibited possessor in violation of A.R.S. § 13-3102(A)(4). The state also alleged Dominguez had two prior convictions. Additionally, Dominguez was facing numerous charges in two other pending causes. By the time of the March 2006 settlement conference in this case, charges in yet another case apparently had been filed against him. A jury trial in the instant cause began first, but on the second day of trial the parties entered into a stipulation whereby Dominguez waived his right to a jury trial and agreed as follows:

> In exchange for a sentence stipulation of 15 years [if found guilty in this cause] with a 5 year probation tail [if found guilty in a second cause], [Dominguez] is giving up the right to a jury trial in [this cause] and [the second cause] and agrees to a bench trial in both separate cases. The defendant further agrees that the judge shall make his determinations of guilty beyond a reasonable doubt or not guilty based solely on the police reports submitted to the court.

> If [Dominguez] is found guilty on [this cause] and [the second cause], the state agrees to dismiss the [two remaining causes].
>
> The defendant further agrees that in [this cause] there exist two aggravating factors: to wit—3 prior felony convictions. This will allow the judge to sentence Mr. Dominguez to a super aggravated sentence.

¶6 The trial court found Dominguez guilty of possession of a deadly weapon by a prohibited possessor in this cause and guilty of the charges in the second cause as well. The remaining charges were dismissed. The trial court imposed a super-aggravated, fifteen-year prison term on the prohibited possessor conviction, and this appeal followed.

DISCUSSION

I. Motion to suppress

¶7 Dominguez first contends the trial court abused its discretion in denying his motion to suppress "[b]ecause the evidence was obtained in violation of [his] Fourth and Fourteenth Amendment rights, [and] should have been excluded." We review the denial of a motion to suppress for a clear abuse of discretion and consider only the evidence presented at the suppression hearing. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). We view that evidence and all reasonable inferences "in the light most favorable to upholding the trial court's ruling." *State v. Wyman*, 197 Ariz. 10, ¶ 2, 3 P.3d 392, 394 (App. 2000).

¶8 The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Warrantless searches are presumptively

unreasonable under the Fourth Amendment, "subject only to a few specifically established, 'jealously and carefully drawn' exceptions." *State v. Fisher*, 141 Ariz. 227, 237, 686 P.2d 750, 760 (1984), *quoting Jones v. United States*, 357 U.S. 493, 499, 78 S. Ct. 1253, 1257 (1958); *see also State v. Gant*, ___ Ariz. ___, ¶ 8, 162 P.3d 640, 642 (2007). A search "conducted incident to a valid arrest" is one such exception. *State v. Lopez*, 198 Ariz. 420, ¶ 8, 10 P.3d 1207, 1208 (2000); *see also Gant*, ___ Ariz. ___, ¶ 9, 162 P.3d at 642.

¶9 Dominguez maintains, however, that his arrest was unlawful and the ensuing search and seizure invalid because officers lacked probable cause to arrest him. Because officers arrested Dominguez without a warrant, probable cause was required. *See State v. Richards*, 110 Ariz. 290, 291, 518 P.2d 113, 114 (1974) ("In order for a warrantless search to be lawful it must be based on 'probable cause'."). This means that "[t]he officer making the arrest must have probable cause to believe that a felony has been committed and that the person arrested committed it." *Id.* Dominguez argues that, as the trial court found, he was under arrest before Swan patted him down and discovered the methamphetamine that had been on his person. Because no probable cause to arrest existed before the officer discovered the drugs, he further argues, the methamphetamine and the weapon officers found during the post-arrest search should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 416 (1963) ("[E]vidence seized during an unlawful search c[an] not constitute proof against the victim of the search."); *State v. Sabin*, 213 Ariz. 586, ¶ 18, 146 P.3d 577, 582-83 (App. 2006). We must determine, therefore, if the trial court abused its discretion in finding the officers had had probable cause to arrest Dominguez.

¶10 At the suppression hearing, Austin testified that several witnesses at the party had told him that "[a] skinny Hispanic male, approximately 5'10", first name Eric" had brandished a gun. He also testified that, although several of the witnesses had not known Eric's last name, "someone [had] told [him] that it was Eric Dominguez at the party." Dominguez, however, contends that the foregoing testimony was "belied" by Austin's concession at the hearing that his report "says nothing to the effect that [one of the witnesses] knew Eric Dominguez" and that Austin neither reported nor recalled specifically who had actually mentioned the last name Dominguez at the party. Likewise, he asserts that "[t]here was no evidence to establish the reliability of" the witnesses at the party, all of whom had been drinking.

¶11 This court, however, defers to the trial court's factual findings, *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996), and to its resolution of any conflicts in the evidence. *State v. Linden*, 136 Ariz. 129, 133, 664 P.2d 673, 677 (App. 1983). Thus, we defer to the court's finding that "a person at th[e] party . . . [had] brandished a weapon and . . . participated in some way in the theft of a keg of beer" and the court's acceptance of Austin's testimony that Dominguez's full name had been mentioned by someone at the party. *See State v. Estrada*, 209 Ariz. 287, ¶ 2, 100 P.3d 452, 453 (App. 2004) ("[T]he trial court, not this court, determines the credibility of the witnesses.").

¶12 Austin also testified that the Bisbee police department had "had [twenty-one] calls for service [regarding] Mr. Dominguez" during the six months preceding the party. That history and the description of the suspect given at the party, Austin further testified,

caused him to "th[ink] of Eric Dominguez." Dominguez, however, argues the testimony about his prior involvement with police was "highly speculative" because Austin "had never before mentioned the previous contacts with [Dominguez]." But, again, this court does not weigh the credibility of witnesses. *Id.* And, "[a] suspect's reputation has probative value and is not to be excluded when determining probable cause." *State v. Donahoe*, 118 Ariz. 37, 42, 574 P.2d 830, 835 (App. 1977). Thus, Austin and the other officers' collective knowledge of Dominguez's criminal history supports the trial court's finding of probable cause for arrest. *See id.; see also State v. Lawson*, 144 Ariz. 547, 553, 698 P.2d 1266, 1272 (1985) ("It is . . . not essential that the arresting officer personally be in possession of all the facts as long as 'probable cause exists from the collective knowledge of all the law enforcement agents involved in this operation.'"), *quoting State v. Sardo*, 112 Ariz. 509, 514, 543 P.2d 1138, 1143 (1975).

¶13 Additionally, we note that after finding the methamphetamine that had been on Dominguez's person, officers obtained a warrant to search the Chevrolet truck in which they had seen a gun in plain sight. As the state points out, search warrants are presumed valid. *State v. Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d 618, 621 (App. 2002); *State v. Kerr*, 142 Ariz. 426, 430, 690 P.2d 145, 149 (App. 1984); *see also* Ariz. R. Crim. P. 16.2(b), 16A A.R.S. And Dominguez does not argue that the warrant here was invalid. Thus, even if the search pursuant to Dominguez's arrest had been invalid, the gun that led to the prohibited possessor charge was properly seized pursuant to a warrant, and the trial court did not err in admitting it into evidence. Viewing the evidence and reasonable inferences in the light

most favorable to sustaining the ruling, as we must, we cannot say the trial court abused its discretion in denying the motion to suppress.[1] *See Wyman*, 197 Ariz. 10, ¶ 2, 3 P.3d at 394.

II. Sufficiency of the evidence

¶14 Dominguez next argues "[t]he police reports which the court relied on in reaching its verdict . . . [we]re not sufficient to establish guilt beyond a reasonable doubt." We will not reverse a conviction for insufficiency of evidence unless "'there is a complete absence of probative facts to support the conviction.'" *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996), *quoting State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976). Indeed, we review "only to determine if substantial evidence exists to support the . . . verdict." *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913 (2005). "Substantial evidence is more than a 'mere scintilla' and is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). And, "[a]ll evidence is viewed in the light most favorable to sustaining the verdict and all reasonable inferences are resolved against the defendant." *State v. Salman*, 182 Ariz. 359, 361, 897 P.2d 661, 663 (App. 1994).

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[1]Because we conclude the trial court did not err in finding that officers had probable cause to arrest Dominguez, we need not address the state's argument that "the trial court adopted [Dominguez's] erroneous definition of arrest" and erred in finding that Dominguez had been under arrest once Swan initially approached him with his weapon drawn. Nor do we address the state's other arguments on inevitable discovery, independent source, or harmless error.

¶15 As noted above, the parties stipulated the trial in this case was to be conducted solely on the basis of police reports. Dominguez now contends those reports were insufficient to prove that he had "knowingly . . . [p]ossess[ed] a deadly weapon or prohibited weapon . . . [as] a prohibited possessor," as § 13-3102(A)(4) requires. To commit that crime, one must be a prohibited possessor as defined in A.R.S. § 13-3101(A)(6),[2] and "knowingly . . . have physical possession or otherwise . . . exercise dominion or control over [a weapon]." A.R.S. § 13-105(30).

¶16 Dominguez asserts that "[a]t the time of his arrest, [he] did not have either actual or constructive possession of the weapon" found in the Chevrolet truck. And, he further contends the evidence about his possession of a weapon at the party was "unreliable." But the police reports contained evidence that witnesses at the party had specifically identified Dominguez by name as having brandished a gun there. And Dominguez later told Austin he had taken a gun away from someone else at the party. Additionally, although Dominguez was near the Dodge truck when he was arrested, Austin reported that Swan had seen Dominguez driving the Chevrolet truck in which the gun was

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[2]That section defines a "'[p]rohibited possessor'" as, inter alia, any person:

> (b) Who has been convicted within or without this state of a felony or who has been adjudicated delinquent for a felony and whose civil right to possess or carry a gun or firearm has not been restored.

The parties do not dispute that Dominguez was a "prohibited possessor" within the meaning of § 13-3101(A)(6).

viewed in plain sight on the truck's front seat and later seized pursuant to the search warrant. And Dominguez was alone at the scene of his arrest. Thus, substantial evidence supported the trial court's implicit finding that Dominguez had possessed a weapon, both at the party and at the time of his arrest. *See Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 913; *Kerr*, 142 Ariz. at 433, 690 P.2d at 152 (evidence of actual possession of weapon supports conviction on prohibited possessor charge); *see also United States v. Bradley*, 473 F.3d 866, 868 (8th Cir. 2007); *United States v. Cardenas*, 864 F.2d 1528, 1535-36 (10th Cir. 1989).

¶17 Although Dominguez suggests the trial court improperly failed "to consider the reliability of witnesses' statements and whether some of those statements were unreliable because of hearsay or even double hearsay," this court does not reweigh the evidence or judge the credibility of witnesses. *State v. Jones*, 188 Ariz. 388, 394, 937 P.2d 310, 316 (1997); *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). And, "if hearsay evidence is admitted without objection, it becomes competent evidence admissible for all purposes." *State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982). Dominguez not only failed to object to the admission of hearsay evidence below, but he actually stipulated to it by agreeing to a bench trial "based solely on the police reports submitted to the court." The trial court, therefore, could properly consider that evidence. Because we cannot say "there is a complete absence of probative facts to support the conviction," *Soto-Fong*, 187 Ariz. at 200, 928 P.2d at 624, we reject Dominguez's insufficient-evidence argument.

III. Sentencing

¶18 Dominguez maintains "[t]he trial court illegally sentenced [him]" and, therefore, "his case should be remanded for re-sentencing." As noted above, the trial court sentenced Dominguez to a super-aggravated, fifteen-year prison term pursuant to A.R.S. § 13-702.01(E). Consistent with the parties' stipulation, the court found Dominguez had two prior felony convictions for purposes of enhancement under § 13-702.01(E); the court also used those same convictions as the two aggravating factors required by that statute. *See also* A.R.S. § 13-702(C)(11) (aggravating circumstances include fact that "defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense."). Dominguez contends that "[t]he sentence violates the specific terms of" § 13-702.01(E) and "violates Arizona's rule against double punishment, A.R.S. § 13-116."

¶19 Even assuming Dominguez may now challenge a sentence he agreed to as part of a stipulation that resulted in the dismissal of several other charges against him, this argument fails.[3] *See United States v. Nguyen*, 46 F.3d 781, 783 (8th Cir. 1995) ("A defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal."). Section 13-116 does not apply to the enhancing and aggravating of sentences. *See State v. LeMaster*, 137 Ariz. 159, 166, 669 P.2d 592, 599 (App. 1983) ("Double jeopardy or double punishment principles do not preclude the trial

[3]Under these circumstances, Dominguez's challenge to his sentence is, at most, subject to review for fundamental error only. *See State v. Ruggiero*, 211 Ariz. 262, ¶ 24, 120 P.3d 690, 695-96 (App. 2005). But "'[i]mposition of an illegal sentence constitutes fundamental error.'" *Id., quoting State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) (alteration in *Ruggiero*).

court from using the prior conviction to impose an enhanced sentence under the recidivist statute, A.R.S. § 13-604, and to find aggravating circumstances under A.R.S. § 13-702."); *see also State v. Bly*, 127 Ariz. 370, 372-73, 621 P.2d 279, 281-82 (1980). And Dominguez cites no authority to support the proposition that a trial court cannot use two separate, prior convictions as two separate aggravating factors under § 13-702(C)(11) to meet the requirements of § 13-702.01(E). *See* Ariz. R. Crim. P. 31.13(c)(1)(vi), 17 A.R.S. In sum, we find no error in Dominguez's sentence.

DISPOSITION

¶20 Dominguez's conviction and sentence are affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge